

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

FACTORY SALES AND  
ENGINEERING, INC., d/b/a FSE  
ENERGY, a Louisiana corporation,

Plaintiff/Counterclaim  
Defendant,

v.

NIPPON PAPER INDUSTRIES USA CO.,  
LTD., a Washington corporation,

Defendant/Counterclaim  
Plaintiff.

FACTORY SALES AND  
ENGINEERING, INC., d/b/a FSE  
ENERGY, a Louisiana corporation,

Third Party Plaintiff,

v.

OPTIMUS INDUSTRIES, L.L.C. d/b/a  
CHANUTE MANUFACTURING  
COMPANY, an Delaware limited liability  
company,

Third Party Defendant.

No. 3:14-cv-05899-RJB

**ORDER ON MOTION TO  
CONSOLIDATE**

FACTORY SALES AND  
ENGINEERING, INC., d/b/a FSE  
ENERGY, a Louisiana corporation,

Plaintiff,

v.

FACTORY MUTUAL INSURANCE  
COMPANY, a Rhode Island corporation;  
and NIPPON PAPER INDUSTRIES USA  
CO., LTD, a Washington corporation,

Defendants.

No. 3:15-cv-05131 RJB

OPTIMUS INDUSTRIES LLC d/b/a  
CHANUTE MANUFACTURING  
COMPANY, a Delaware limited liability  
company,

Plaintiff,

v.

FACTORY MUTUAL INSURANCE  
COMPANY, a foreign insurance company,

Defendant.

No. 3:15-cv-05149 RJB

THIS MATTER comes before the Court on a motion by Factory Sales and Engineering, Inc. (“FSE”) to consolidate three cases:

- (1) *FACTORY SALES AND ENGINEERING, INC., d/b/a FSE ENERGY v. NIPPON PAPER INDUSTRIES USA CO., LTD.; FACTORY SALES AND ENGINEERING, INC., d/b/a FSE ENERGY v. OPTIMUS INDUSTRIES LLC d/b/a CHANUTE MANUFACTURING COMPANY*, No. 3:14-CV-05899-RJB (the “FSE/Nippon Action”); and
- (2) *FACTORY SALES AND ENGINEERING, INC. d/b/a FSE ENERGY v. FACTORY MUTUAL INSURANCE COMPANY and NIPPON PAPER INDUSTRIES USA CO., LTD*, No. 3:15-CV-05131-RJB (the “FSE/FM Insurance Action”); and

1 (3) *CHANUTE MANUFACTURING COMPANY* v. *FACTORY MUTUAL*  
 2 *INSURANCE COMPANY*, No. 3:15-CV-05149-RJB (the “CHANUTE/FM  
 Insurance Action”)

3 Nippon Paper Industries USA Co. Ltd. (“Nippon”) and Optimus Industries, LLC d/b/a Chanute  
 4 Manufacturing Company (“Chanute”) join in FSE’s motion. 3:14-CV-05899-RJB, Dkt. 41, 45.  
 5 The Court will refer to FSE, Nippon, and Chanute collectively as “Movants” and to Factory  
 6 Mutual Insurance Company (“FM Insurance”), who opposes the motion, as “Opponent.” 3:15-  
 7 CV-05149-RJB, Dkt. 14. The Court has reviewed Movants’ motions, the responsive briefing from  
 8 Opponent, and the remainder of the file therein.

### 9 I. BACKGROUND

10 The three cases that Movants seek to consolidate stem from the same set of facts. Nippon,  
 11 owner of a biomass power facility, and FSE, a contractor, executed a contract (“the Contract”) for  
 12 FSE’s “design, manufacture, shipping, erection and successful testing” of a biomass boiler. 3:14-  
 13 5131-RJB, Dkt. 23-1, at 3. The Contract contains a “Waivers of Subrogation” provision between  
 14 Nippon and FSE and requires that Nippon obtain and maintain contractor’s insurance, which  
 15 Nippon did prior to commencement of construction by FSE and its subcontractor, Chanute. *Id.*, at  
 16 14, 15. *See* 3:14-5131-RJB, Dkt. 23-2.

18 Opponent, FM Insurance, designated Nippon as its Named Insured in issuing a one-year  
 19 insurance policy. *Id.*, at 7. The Policy contains a Property Damage provision, which specifies the  
 20 scope of the insurance to “insure the following property . . . to the extent of the interest of the  
 21 Insured” and to “also insur[e] the interest of contractors and subcontractors in insured property  
 22 during construction[.]” *Id.*, at 16. Pursuant to the Contract, FSE undertook the installation of a  
 23 “mud drum,” which was fabricated by Chanute, but for reasons contested by the parties, the mud  
 24 drum caused damage to Nippon’s boiler. *Id.*

### 26 II. DISCUSSION

1 Movants argue that three cases should be consolidated because each case requires the  
 2 resolution of at least three common issues: (1) the cause of damage to the mud drum; (2) the  
 3 scope of the Policy's coverage; and (3) the scope of the Contract. 3:14-CV-5899-RJB, Dkt. 36, 4-  
 4 7. Consolidating the cases avoids duplicative litigation, unnecessary expense, delay to the parties,  
 5 and conflicting rulings, Movants contend, and there is no prejudice to the parties by  
 6 consolidating. *Id.*, at 6-8.

8 Opponent agrees with Movants that the cause of damage to the mud drum and scope of  
 9 the Policy's coverage are relevant to FM Insurance's cases, but according to Opponent, the scope  
 10 of the Contract is not "common" to FM Insurance's cases, since the Contract was executed  
 11 between FSE and Nippon. 3:14-CV-5149-RJB, Dkt. 14, at 2, 5. Moreover, Opponent argues,  
 12 consolidating the cases causes prejudice to FM Insurance, and the rules provide for other  
 13 remedies other than *en masse* consolidation, such as bifurcated trials, that would better serve the  
 14 ends of justice. *Id.*, at 5-7.

16 In its entirety, Fed. R. Civ. Pro. 42 provides as follows:

17 (a) CONSOLIDATION. If actions before the court involve a common question of law or fact, the  
 18 court may:

18 (1) join for hearing or trial any or all matters at issue in the actions;

19 (2) consolidate the actions; or

19 (3) issue any other orders to avoid unnecessary cost or delay.

20 (b) SEPARATE TRIALS. For convenience, to avoid prejudice, or to expedite and economize, the  
 21 court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims,  
 21 or third-party claims. When ordering a separate trial, the court must preserve any federal right to a  
 22 jury trial.

22 As indicated by Rule 42's use of the word "may," the decision to join hearings or trials is a discretionary  
 23 decision. *See* Fed. R. Civ. Pro. 42. District Court judges are afforded broad discretion, subject only to an  
 24 abuse of discretion standard on appeal. *Investors Research Co. v. U.S. Dist. Court for Cent. Dist. of*  
 25 *California*, 877 F.2d 777 (9th Cir. 1989).

1 In this case, the Court finds that the three cases (*supra*) should be consolidated. Although the  
2 parties have very different interests in the three respective matters, all three cases share common questions  
3 of law and fact. Taking the facts as alleged and without commenting on the merits or likely outcome at  
4 trial, the Court can foresee significant overlap in the three main issues at trial: the cause of the damage, the  
5 scope of the Contract, and the scope of the Policy. Opponent only contests the relevancy of the scope of  
6 the Contract, but Opponent's argument is misguided. Although, unlike FSE and Nippon, FM Insurance  
7 was not a signatory to the Contract, interpreting the Policy and resolving the cause of the damage  
8 definitively affect the application of the Policy. For example, the Contract arguably impacts coverage  
9 under the Policy where the Contract contains a subrogation clause. In fact, the Complaint in the FSE/FM  
10 Insurance action relies on the Contract's subrogation clause at length. *See* 3:14-CV-5899-RJB, Dkt. 1, at 3.

11 FM Insurance's argument that FM Insurance is prejudiced by consolidation is unpersuasive. FM  
12 Insurance argues "equity should trump purported 'efficiency'" but fails to articulate how litigating a case  
13 stemming from the same set of facts is prejudicial, especially where FM Insurance has been integrally  
14 involved in the resolution of the damage.

15 Furthermore, issues of bifurcating trials can be addressed and resolved in the future. Consolidation  
16 does not prevent bifurcation.

17 \* \* \*

18  
19 Therefore, it is hereby

20 ORDERED, ADJUDGED AND DECREED that the following cases shall be  
21 consolidated: Case Nos. 3:14-CV-05899-RJB, 3:15-CV-05131-RJB, and 3:15-CV-5149-RJB.

22 All future pleadings, hearings and trial shall be presented to this Court under Case No.  
23 3:14-cv-05899-RJB.  
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1           The parties are requested to submit an updated Joint Status Report to the Court within 14  
2 days of the issuance of this order.

3           DATED this 18<sup>th</sup> day of June, 2015.

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7           ROBERT J. BRYAN  
8           United States District Judge  
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